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IN THE

Supreme Court of the United States

No. 123. October Term, 1937.

HARVEY S. ADAMS, Receiver, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,

Petitioner,

v.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY and WILLIAM M. MAYER.

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Petitioner,

v.

J. EDWIN TOBIAS, RALPH S. HILL and OSCAR P. SMITH.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief for Respondents.

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 20-22, 24-25, 53,

55) are not reported. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 66-72) is reported in 88 Fed. (2) 936. The dissenting opinion (R. 72-74) is reported in 88 Fed. (2) 940.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the judicial code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Is the power of the Comptroller of the Currency to make an assessment on stockholders of a national bank subject to the basic or quasi-jurisdictional fact that the ordinary resources of the bank have been exhausted?

2. Is an assessment made by the comptroller where the ordinary resources of the bank have not been exhausted because of the unlawful abrogation of a valid claim sufficient to pay all debts, subject to a direct attack by a suit in equity on the grounds that, upon the facts alleged in the bills of complaint and admitted by the motions to dismiss, the assessment was beyond the comptroller's statutory power, violated the requirements of due process, and was arbitrary and capricious?

STATEMENT OF FACTS.

The material facts set forth in the bills of complaint as amended, which on the motions to dismiss are deemed admitted, are as follows.

Prior to February 17, 1933, there were three national banks in the City of Reading, Pennsylvania: the Penn National Bank and Trust Company of Reading, the Reading

National Bank and Trust Company, and the Farmers National Bank and Trust Company of Reading.

On February 17, 1933, the Penn National Bank and the Reading National Bank were subjected to unsual withdrawals of deposits which depleted their reserves and placed both banks on the verge of insolvency. (R. 5, 37.) Because of these conditions the two banks entered into an agreement with the Farmers National Bank on February 17, 1933, whereby, in contemplation of a consolidation with Farmers National Bank, it was agreed that all the assets of the Penn National Bank and the Reading National Bank should be transferred forthwith to the Farmers National Bank, conditioned upon the immediate assumption by the Farmers National Bank of all the deposit liabilities, as well as all other liabilities, of the Penn National Bank and the Reading National Bank, excepting liabilities to stockholders as such. (R. 5, 6, 37, 38.) The contract was executed by all parties (Exhibit A, R. 11-13; Exhibit A, R. 44-46).

A supplemental contract was entered into by the parties on February 20, 1933, at the suggestion and direction of the Comptroller of the Currency. In this supplemental contract, the Penn National Bank and the Reading National Bank guaranteed to the Farmers National Bank that their respective assets would in value exceed the deposit liability and other liabilities assumed by the Farmers National Bank (R. 4-5, 37, Exhibit B 13-14; Exhibit B 46-47).

The terms of the agreement of February 17, 1933, relating to the transfer of assets were duly carried out and the Penn National Bank and the Reading National Bank transferred to the Farmers National Bank all their assets and surrendered complete control and possession of their business to the Farmers National Bank. In accordance with the provisions of the agreement, the Farmers National Bank

appointed executive officers to conduct its business at the former places of business of the Penn National Bank and the Reading National Bank, which were designated as branches of the Farmers National Bank and from that time on the Penn National Bank and the Reading National Bank ceased to exercise any control or dominion over their former assets and ceased to transact any business whatsoever. All of this was done with the knowledge, approval and acquiescence of the Comptroller of the Currency (R. 5, 38).

At the time of the execution of the agreement of February 17, 1933, and the transfer of the assets, the assets of both the Penn National Bank and the Reading National Bank had a value in excess of the liabilities assumed by the Farmers National Bank (R. 5-6, 38), and the claims of the two banks against the Farmers National Bank were and still are more than sufficient in the ordinary course of liquidation to pay and discharge all their liabilities without the necessity of an assessment on the stockholders (R. 22-24, 53-54).

The Farmers National Bank continued to do business with its combined and commingled assets from February 17 until March 18, 1933, when the acting Comptroller of the Currency appointed a conservator for the Farmers National Bank. The conservator took possession of all the assets, including the assets which had been acquired from the Penn National Bank and the Reading National Bank, and began his administration thereof (R. 7, 39-40).

Eight months later, on or about October 10, 1933, the Comptroller of the Currency, without notice of any kind to either the Penn National Bank, the Reading National Bank, or any of their depositors, creditors, or stockholders, and without a hearing of any kind, and without warrant or authority of law or a decree or order of any court, made

a ruling to the effect that the agreements of February 17 and February 20, 1933, were without legal effect, and directed that the transfer and delivery of the assets and the assumption of the liabilities which had been effected under these contracts should be disregarded, and attempted to allocate among the three banks the assets transferred and delivered theretofore to the Farmers National Bank (R. 7, 40). At the same time the comptroller appointed a conservator for the Penn National Bank and one for the Reading National Bank, choosing to designate the same individual for each of the three institutions (R. 7-8, 40) in spite of the adverse interests of each against the other (R. 8, 41).

A so-called plan of reorganization of the three banks was then proposed by the comptroller, which provided for the creation of a new national bank. Pursuant to this plan the conservator arbitrarily reconstructed the assets and liabilities of each of the three banks as of April 24, 1933 and made an arbitrary division thereof among them. A loan was obtained from the Reconstruction Finance Corporation by a pledge of certain of the assets. Other assets were sold. The new national bank established on its books lump sum credits for the benefit of the conservator of each of the three banks in amounts sufficient to permit a distribution to the creditors of each of the three banks in the following percentages of the claims against each; Farmers National Bank, 35 per cent.; Penn National Bank, 25 per cent.; Reading National Bank, 25 per cent. (R. 8, 22-24, 40-41, 53-54).

Pursuant to the instructions of the comptroller and in accordance with his ruling abrogating the agreements of February 17 and 20, 1933, and all rights and obligations thereunder, the conservator ignored and disregarded the claim of the Penn National Bank against the Farmers Na-

tional Bank in the amount of approximately $5,100,000 and ignored and disregarded the claim of the Reading National Bank against the Farmers National Bank in the amount of approximately $9,000,000 and made no attempt to compel the Farmers National Bank to discharge its obligation to either the Penn National Bank or the Reading National Bank (R. 8-9, 41).

A year later, after completion of the so-called plan of reorganization, the comptroller appointed receivers for each of the three banks who failed, neglected and refused to collect the claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank, which were the only and ordinary resources of the two banks for the payment of their creditors and by reason thereof failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed (R. 9-10, 42).

On January 15, 1935, after reciting that upon a proper accounting by the receivers and upon a valuation of the uncollected assets it appeared necessary to assess the stockholders, he made an assessment upon the shareholders of the Penn National Bank and the Reading National Bank, demanding the payment of 100 per cent. of the par value of their stock (R. 9, Exhibit C, 14-15; R. 42, Exhibit C, 47-48). The alleged valuation made by the comptroller upon the alleged proper accounting, on which the assessments were made excluded as an asset of the Penn National Bank its claim against the Farmers National Bank of approximately $5,100,000 and excluded as an asset of the Reading National Bank its claim against the Farmers National Bank of approximately $9,000,000 (R. 10, 42-43).

SUMMARY OF ARGUMENT.

I. The Statutory Liability of Stockholders of a National Bank Is Conditional Upon the Exhaustion of the Ordinary Assets of the Bank.

II. The Power of the Comptroller to Make a Determination as to the Necessity and Amount of an Assessment Is Subject to the Basic or Quasi-Jurisdictional Fact that the Ordinary Resources of the Bank Have Been Exhausted.

III. An Order of Assessment by the Comptroller Is Subject to a Direct Attack in Equity on the Grounds That It Was Beyond His Statutory Power, Violated the Requirements of Due Process, or Was Arbitrary and Capricious.

IV. The Bills of Complaint Set Forth a Cause for Equitable Relief by Specifically Alleging Facts Which Show That the Assessment by the Comptroller Was Beyond His Authority, Violated the Requirements of Due Process, and Was Arbitrary and Capricious.

(a) The Only Assets of the Penn National Bank and the Reading National Bank Are Their Claims Against the Farmers National Bank.

(b) The Claims Are Sufficient to Pay All the Debts of the Two Banks Without the Necessity of an Assessment on Stockholders.

(c) The Comptroller Refused to Enforce the Claims.

(d) The Comptroller Without Authority Abrogated the Claims.

V. The Contention that Respondents Are Guilty of Laches Was Not Considered by the Circuit Court of Appeals, Was Not Mentioned in the Petition for Writ of Certiorari or in the Specifications of Error, and Is Without Merit.

ARGUMENT.

I.

The Statutory Liability of Stockholders of a National Bank Is Conditional Upon the Exhaustion of the Ordinary Assets of the Bank.

The statutory liability of stockholders of a national bank upon the voluntary or involuntary liquidation of the bank is set forth in 12 U. S. C. Sec. 64 (Act of December 23, 1913, Chap. 6, Sec. 23, 38 Stat. 273; See also 12 U. S. C. Sec. 63, Rev. Stat. Sec. 5151) as follows:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock . . . ."

Section 191 of 12 U. S. C. (Act of June 30, 1876, Chap. 156, Sec. 1, 19 Stat. 63) provides that the comptroller whenever he shall become satisfied of the insolvency of a bank after due examination of its affairs, may appoint a receiver "who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in Section 192".

Section 192 of 12 U. S. C. (Rev. Stat. Sec. 5234, as amended by Act of May 15, 1916, Chap. 121, 39 Stat. 121) provides as follows:

> " . . . Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts,

> and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings . . . ."

This is the section which is primarily involved in the present case. It prescribes the duties of the receiver which are to be performed by him under the direction of the comptroller. These duties are: first, to take possession of all books, records and assets of the bank, collect the claims of the bank, upon order of court sell or compound all bad or doubtful debts, and sell real and personal property on such terms as the court shall direct; and, second, "if necessary to pay the debts of such association, enforce the individual liability of the stockholders".

Under the direction of the comptroller the receiver is required by the statute to perform the duties enumerated. Until he does perform his duties of collecting and liquidating the assets of the bank, there is no basis on which to form the conclusion of the necessity to enforce the personal liability of the stockholders. The duties enjoined upon the receiver are specifically and definitely enumerated. Not until after making this enumeration does the statute provide that the receiver may, "if necessary to pay the debts" enforce the individual liability of the stockholders. In other words by the terms of the statute itself, the performance by the receiver of his duties to collect and liquidate the assets of the bank is a condition precedent to the enforcement of the statutory liability of the stockholders. His duty to enforce the individual liability arises only when his other duties have been performed as theretofore enumerated.

Thus the individual liability of a stockholder is a conditional liability. The ordinary resources of the bank must first be exhausted.

Not only does this conclusion result from the phraseology and implications of the statute, but it is confirmed by its history and congressional reports.

The original National Bank Act (Act of February 25, 1863, c. 58, sec. 12, 12 Stat. 665) provided for the individual liability of stockholders but did not prescribe a method for the enforcement of the liability. As explained in the Senate by the chairman of the committee having charge of the bill, this was left for future legislation. (Cong. Globe, 37 Cong. 3rd Session, Part 1, pp. 824-825.)

The original National Bank Act was repealed in its entirety, with certain saving clauses, the following year and the Act of June 3, 1864 (c. 106, 13 Stat. 99) was adopted in its place. This act originated in House Bill No. 395 which was passed by the House and in the Senate was referred to the Committee on Finance which reported the bill with amendments.

Section 12 of the bill provided for the individual liability of stockholders and was enacted without amendment. From that section is derived the present Section 63 of 12 U. S. C. which, so far as the individual liability of stockholders is concerned, is identical with the present Section 64 of 12 U. S. C.

Section 50 of the bill provided for the liquidation of the affairs of the bank by the receiver under the direction of the comptroller. Like the similar section in the Act of 1863, it did not provide a method for the enforcement of the individual stockholders' liability and consequently it was amended for that purpose. From this section, as finally

enacted, is derived the present Section 192 of 12 U. S. C. (Supra, pages 8-9.)

Two amendments were proposed in the Senate. One, offered by Senator Cowan of Pennsylvania, was to insert a clause requiring the receiver to collect "an amount from each shareholder equal to the amount of stock held by such stockholder." The other was offered by Senator Sherman of Ohio, a member of the committee having charge of the bill, and was to insert the following clause after the enumeration of the duties of the receiver: "and may, if necessary to pay the debts of such association, enforce the individual liability provided for by the twelfth section of this Act".

During the debate it was pointed out that the Cowan amendment would require the receiver to enforce the individual liability of the stockholders immediately without regard to the assets of the bank. On the other hand, Senator Sherman explained that his amendment would "enable the receiver at any time whenever it becomes necessary, to enforce the individual liability; and in case it is not necessary, if the other assets are sufficient, he will not enforce this contingent liability, which is intended as an ultimate security of the creditors of the bank."

After full explanation of its purpose and effect the amendment proposed by Senator Sherman of the Committee on Finance, was adopted. (Cong. Globe, 38 Cong. 1st Session, pp. 2203-2204, set forth in full in Appendix to Respondents' Brief, pp. 1a to 9a.)

This Court recognized the conditional nature of the stockholders' liability in BANK v. KENNEDY, 17 Wall. 19, when it said (page 22) (italics ours):

> **". . . Stockholders are not ordinary debtors of the bank, but are rather in the light of creditors, their stock being regarded as a liability. They are entitled**

to all the surplus that remains, if any should remain, after the payment of the debts. *They are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted,* and they ought not to be prosecuted without due regard to the circumstances of the case . . . ."

II.

The Power of the Comptroller To Make a Determination as to the Necessity and Amount of an Assessment Is Subject to the Basic or Quasi-Jurisdictional Fact That the Ordinary Resources of the Bank Have Been Exhausted.

The statute gives authority to the receiver to enforce the individual liability of the stockholders under the direction of the comptroller. It was early held by this Court in the leading case of KENNEDY v. GIBSON, 8 Wall. 498, that before the receiver can act the comptroller must first determine both the necessity for and the amount of any assessment to be made. As stated in that case (page 505), "this action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver". This has since been the uniform rule.

But, as the statutory liability of stockholders is subject to the condition precedent of the exhaustion of the ordinary assets of the bank, so the determination of the comptroller as to the necessity and amount of the assessment is subject to the same condition precedent.

This was expressly recognized in UNITED STATES v. KNOX, 102 U. S. 422. In that case the comptroller had assessed the stockholders of a national bank a sufficient percentage upon the par value of the stock held by them to discharge the liabilities of the bank, but by reason of the

inability of the receiver to collect from insolvent and foreign stockholders, a deficit still existed. A creditor filed a petition for a writ of mandamus directed to the comptroller to require him to make a further assessment. The petition was denied and on appeal the decision was affirmed. In the course of the opinion written by Mr. Justice Swayne, who also wrote the opinion in KENNEDY v. GIBSON, *supra*, this Court discussed the duties of the comptroller in making an assessment and said (page 425) (italics ours):

> "In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the shareholders; 2, *the amount of the deficit to be paid after exhausting all the assets of the bank;* 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value . . . ."

It is clear, therefore, that the comptroller must first exhaust all the assets of the bank before he may proceed to ascertain the amount of the deficit to be paid by the stockholders. His determination of the necessity and amount of the assessment is subject to the condition precedent that the assets of the bank have been exhausted. This is a condition which is to be fulfilled by him before his power to make an assessment arises. It is not a matter which is entrusted to his judgment and discretion. It is a basic or quasi-jurisdictional fact conditioning his power. In all cases the absence of the basic or quasi-jurisdictional fact required to support an administrative order renders it void. UNITED STATES v. B. & O. R. Co., 293 U. S. 454, 464; UNITED STATES v. CHICAGO, M., ST. P. & P. R. Co., 294 U. S. 499,

504; BORAX LTD. v. LOS ANGELES, 296 U. S. 10, 18; CROWELL v. BENSON, 285 U. S. 22, 54; FLORIDA v. UNITED STATES, 282 U. S. 194, 215.

Because the statute does not provide for a judicial review of the determination of the comptroller as to the necessity of an assessment, he is not required to make quasi-jurisdictional findings. UNITED STATES v. B. & O. R. Co., *supra*.

It is conceded that there is the presumption that a public officer has properly performed his duties. PHILADELPHIA AND TRENTON R. Co. v. STIMPSON, 14 Peters 448, 458; U. S. v. CHEMICAL FOUNDATION, 272 U. S. 1, 14-15. The presumption is stronger where the administrative order contains a recital of procedure conforming to the statutory requirements. But it is still merely a presumption and operates only until the contrary is shown in appropriate proceedings. The rule does not preclude proof that the conditions precedent to the exercise of the power have in fact not been complied with.

Nor is the recital conclusive. This Court in MORGAN v. UNITED STATES, 298 U. S. 468, in speaking of the recitals in an administrative order of the Secretary of Agriculture under the Packers and Stockyards' Act, said (page 477):

> "... in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion ..."

In his dissenting opinion in the present case, Judge Buffington relies upon the recitals in the orders of assessment. He quotes them and then concludes (R. 73): "It

therefore appears the receivers have collected the assets of said banks and on the basis of what has been collected and the valuation of those not collected (which would include the alleged claims of Penn and Reading against Farmers) it was necessary to assess the shareholders 100% . . . ." But the recitals are not conclusive and the bills of complaint in express terms contradict the recitals. They contain the positive allegations that the valuation by the comptroller *excluded* as assets the claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank. (Par. 26, R. 10; Par. 26, R. 42-43.) Those allegations are supported by the detailed averments concerning the origin of the claims and their unlawful abrogation by the comptroller.

Whether or not, in a given case, the receiver has performed his duties and exhausted the ordinary resources of the bank before the comptroller makes an assessment is a pure question of fact, to be decided, as stated in BANK v. KENNEDY, *supra*, "with due regard to the circumstances of the case". After a reasonable performance by the receiver of his duties of collecting and liquidating the ordinary assets of the bank, the comptroller may properly value the remaining assets, and if a deficit exists, determine the necessity and amount of the assessment. It is conceded that the comptroller need not wait until all of the assets of the insolvent bank are literally exhausted before he can determine the necessity of enforcing the individual liability of the stockholders. To compel him thus to wait would unduly delay the winding up of banks and would be impractical.

But the comptroller has no authority completely to disregard all of the assets of the bank, abrogate its valid claims which would discharge its liabilities and obviate the necessity for an assessment, and proceed directly to enforce the

individual liability of the stockholders in complete disregard of the statutory prerequisites. In the words of the majority opinion of the Circuit Court of Appeals (R. 70): "But no case has gone so far as to hold that the Comptroller may entirely disregard the statutory provisions for winding up an insolvent bank and arbitrarily, and in violation of law, enforce the individual liability of stockholders . . . ."

Applying these principles to the instant case, the bills affirmatively show that the comptroller did not exhaust the ordinary resources of the banks and that by attempting to abrogate the claims of the two banks against the Farmers National Bank, which were their only resources for the payment of their debts, he acted arbitrarily and capriciously and in violation of the requirements of due process in making the assessment.

III.

An Order of Assessment by the Comptroller Is Subject to a Direct Attack in Equity on the Grounds That It Was Beyond His Statutory Power, Violated the Requirements of Due Process, or Was Arbitrary and Capricious.

It is recognized by the respondents that the determination of the comptroller as to the necessity and amount of an assessment, insofar as it involves merely the exercise of judgment, is conclusive. A stockholder of a national bank submits himself to the laws of the United States relating to the incorporation and regulation of national banks. Those laws impose upon stockholders the liability for the debts of the bank and the determination by the comptroller as to the necessity and amount of the assessment is an incident of the incorporation.

It has been settled by an unbroken line of authorities beginning with KENNEDY v. GIBSON, 8 Wall. 498, that the

comptroller's determination is conclusive in an action at law to enforce the stockholder's liability and cannot be collaterally attacked. CASEY v. GALLI, 94 U. S. 673; GERMANIA NAT'L BANK v. CASE, 99 U. S. 628; BUSHNELL v. LELAND, 164 U. S. 684; FORREST v. JACK, 294 U. S. 158; DEWEESE v. SMITH, 106 Fed. 438 (C. C. A. 8), aff. SMITH v. BROWN, 187 U. S. 637; MURRAY v. SILL, 7 Fed. (2) 589 (C. C. A. 9); COLLINS v. CALDWELL, 29 Fed. (2) 329 (C. C. A. 5); CHASE v. HALL, 30 Fed. (2) 195 (C. C. A. 9); MILLER v. STOCK, 65 Fed. (2) 773 (C. C. A. 3); B. V. EMERY & Co. v. WILKINSON, 72 Fed. (2) 10 (C. C. A. 10).

The dissenting opinion of Judge Buffington in the present case relied upon MILLER v. STOCK, *supra*. In that case suit was brought by the receiver to recover the amount of the assessment, and the defense was that the assets of the bank were sufficient to pay its debts, that the bank was solvent, and that the comptroller had not sufficient evidence to warrant the appointment of a receiver or to justify the making of the assessment. Judge Buffington wrote the opinion and held that such a defense was not valid in a suit to enforce the stockholders' liability and that the action of the comptroller in making the assessment could not be collaterally attacked. That decision is sound and is in line with the other authorities above cited. But it has no relevancy to the present case which does not involve a collateral attack.

The comptroller's determination is likewise conclusive in proceedings to enjoin the enforcement of the assessment by suits in equity or by equitable defenses interposed in actions at law, *where the grounds are not those upon which equity affords relief against administrative orders.* LIBERTY NATIONAL BANK v. MCINTOSH, 16 Fed. (2) 906 (C. C. A. 4); COLLINS v. CALDWELL, 29 Fed. (2) 329 (C. C. A. 5); CRAW-

FORD v. GAMBLE, 57 Fed. (2) 15 (C. C. A. 6); WANNAMAKER v. EDISTO NATIONAL BANK, 62 Fed. (2) 696 (C. C. A. 4); SCHRAM v. SCHWARTZ, 68 Fed. (2) 699 (C. C. A. 2); MEEKER v. BAXTER, 83 Fed. (2) 183 (C. C. A. 2); SILK v. AKE, 83 Fed. (2) 618 (C. C. A. 6); DAVIS TRUST CO. v. HARDEE, 85 Fed. (2) 571 (C. C. A. D. C.); ACKER v. HAMILTON, 85 Fed. (2) 574 (C. C. A. D. C.); BARBOUR v. THOMAS, 86 Fed. (2) 510 (C. C. A. 6); TRUSTEES OF SOMERSET ACADEMY v. PICHER, 90 Fed. (2) 741 (C. C. A. 1); CHURCH v. HUBBARD, 91 Fed. (2) 406 (C. C. A. 6).

But the determination of the comptroller is not conclusive and his order of assessment is subject to a direct attack in equity where his order was beyond his statutory power, violated the requirements of due process, or was arbitrary and capricious. A bill in equity for an injunction is the recognized mode of procedure by which the wrongful action of an administrative officer, even though he be the head of a government department, may be restrained.

The grounds which have been recognized for such relief are: (a) that the order was beyond the statutory power of the officer, SCHOOL OF MAGNETIC HEALING v. MCANNULTY, 187 U. S. 94; KNIGHT v. LANE, 228 U. S. 6; GARFIELD v. GOLDSBY, 211 U. S. 249; NOBLE v. UNION RIVER LOGGING R. R. Co., 147 U. S. 165; NEW ORLEANS v. PAINE, 147 U. S. 261; (b) that the order impairs vested rights, BALLINGER v. FROST, 216 U. S. 240; NOBLE v. UNION RIVER LOGGING CO., *supra;* GARFIELD v. GOLDSBY, *supra;* and (c) that the order was arbitrary, capricious, and unreasonable, GARFIELD v. GOLDSBY, *supra;* BALLINGER v. FROST, *supra;* LANE v. MICKADIET, 241 U. S. 201; KNIGHT v. LANE, *supra.*

The rule was recognized by this Court as applicable to the Comptroller of the Currency in UNITED STATES v. KNOX, 102 U. S. 422, which case was cited hereinbefore with respect

to the prerequisites to the validity of the order of assessment. (Supra, pages 12-13.) The Court, after setting forth those prerequisites, stated (p. 425):

> "Although assessments made by the Comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

In TRUSTEES OF SOMERSET ACADEMY v. PICHER, 90 Fed. (2) 741 (C. C. A. 1), a case relied upon by the petitioners, the bill prayed that the receiver be enjoined from instituting any suits to collect assessments against the stockholders of the bank. The bill was amended to include the prayer "that the comptroller's finding of October 2, 1934, be declared null and void." After hearing the bill was dismissed. The evidence to support the bill was held both by the District Court and by the Circuit Court of Appeals to be irrelevant and immaterial. It related to the validity of a note of the insolvent bank because of which the assessment was made. But the court recognized the rule that an assessment is subject to a direct attack, saying (page 743): "It cannot be maintained that the plaintiff's complaint is a direct attack on the Comptroller's action. To constitute a direct attack upon the judgment of the Comptroller there must be allegations of fraud on his part or a lack of power to act in the premises . . ."

In MERKER v. BAXTER, 83 Fed. (2) 183 (C. C. A. 2), also relied upon by the petitioners, a suit was brought by the receiver against stockholders to enforce the assessment,

The answer denied everything in the complaint and set up three separate defenses pleaded both as such and as counterclaims. The second defense set up was that the bank had been indebted to the Reconstruction Finance Company in the sum of $200,000., that in fraud of its creditors it had conveyed its banking house for $366,000. to another company, that the grantee had then executed a mortgage back to the bank which it in turn assigned to the Reconstruction Finance Company, that the fair valuation of the property had not been taken into account in determining the alleged liability for which the action was brought, and that on this account the assessment was made in bad faith and was fraudulent, illegal and void. The court recognized that an assessment is subject to a direct attack but held the defense insufficient for want of specific allegations, saying (page 186): "... the second [defense] amounted to no more than that the Comptroller did not take all the bank's property into his computation. It was not enough to add that the assessment was 'made in bad faith, and is fraudulent, illegal and void'; such charges must be explicit. If the defendants really meant to say that the Comptroller omitted the mortgage from his computation of the assets, knowing that the transfer was fraudulent and that the property should have been included, they were obliged to say so in detail."

In many of the other cases cited hereinbefore (Supra, pages 17-18) where the determination of the comptroller was held to be conclusive, the courts have recognized the right of a stockholder *on proper grounds* to make a direct attack upon the order of assessment by a suit in equity for an injunction.

In the more recent of these cases the grounds for a direct attack are described as "errors of law, fraud or

mistake", or simply "fraud". These expressions apparently had their origin in the opinion of Judge Walter H. Sanborn in DEWEESE v. SMITH, *supra*, in which it is stated (p. 445):

> " . . . Under the acts of Congress and the decisions of the courts to which reference has been made the comptroller of the currency constitutes a quasi judicial tribunal, to whose exclusive determination Congress has intrusted the decision in the first instance of the questions, what proportion of the full liability of the shareholder of an insolvent bank it is necessary to collect to pay its debts, and when this amount shall be paid. His decisions of questions within his jurisdiction are, like the decisions of the land department and of other quasi judicial tribunals, impervious to collateral attack, and open to avoidance by the court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake. U. S. v. KNOX, 102 U. S. 422, 425, 26 L. Ed. 216; U. S. v. NORTHERN PAC. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; BOGAN v. MORTGAGE Co., 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. v. WINONA & ST. P. R. Co., 67 Fed. 948, 959, 15 C. C. A. 96, 107, 32 U. S. App. 272, 289 . . . ."

But the expression "errors of law, fraud, or mistake" as the grounds for direct attack upon administrative orders is too broad and indefinite. Mistake or error of judgment on the part of the comptroller cannot be a ground for an attack on an assessment. Fraud is too indefinite a term with too many connotations to be of any help without precise definition. And not every error of law would justify the invalidation of an administrative order.

It is respectfully submitted that the grounds upon which an order of assessment by the comptroller may be directly attacked are those on which any administrative

order may be challenged, viz., that the order was beyond his statutory power, or violated the requirements of due process, or was arbitrary and capricious. The Comptroller of the Currency stands in no different position than any other administrative officer of the government. If his actions are beyond his authority, if he violates the requirements of due process, or acts in an arbitrary and capricious manner, he is subject to the control of courts of law. Equity may restrain him.

IV.

The Bills of Complaint Set Forth a Cause for Equitable Relief by Specifically Alleging Facts Which Show That the Assessment by the Comptroller Was Beyond His Authority, Violated the Requirements of Due Process, and Was Arbitrary and Capricious.

To the bills of complaint the defendants filed motions to dismiss. A motion to dismiss is in the nature of a demurrer and admits all the facts which are well pleaded.

The petitioners complain that the bills contain "vague inferences and legal conclusions". (See Petitioners' Brief, pages 16, 18.) While there are some averments in the bills which partake of the nature of conclusions, such averments are proper for the purpose of showing the true theory underlying the suits and to indicate the aspect on which the proofs are to be interpreted. ALLEN v. O'DONALD, 23 Fed. 573; aff. 141 U. S. 528; 1 STREET, FEDERAL EQUITY PRACTICE, Sec. 175, p. 102; CLARK ON CODE PLEADING, 157.

The bills do not allege mere conclusions. They contain specific allegations of the facts upon which the right of the respondents to equitable relief depends. These averments are precise and definite and may be arranged for convenience under the following headings:

a. The only assets of the Penn National Bank and the Reading National Bank are their claims against the Farmers National Bank.

b. These claims are sufficient to pay all their debts without the necessity of an assessment on stockholders.

c. The comptroller refused to enforce these claims.

d. The comptroller without any authority abrogated the claims.

(a) THE ONLY ASSETS OF THE PENN NATIONAL BANK AND THE READING NATIONAL BANK ARE THEIR CLAIMS AGAINST THE FARMERS NATIONAL BANK.

The bills allege that at the time of the execution of the agreement of February 17, 1933, the Penn National Bank and the Reading National Bank were on the verge of insolvency and, because of such emergency, the agreement was entered into with the Farmers National Bank after authority by resolutions of the boards of directors of the respective banks (Par. 8, R. 5; Par. 8, R. 37). The agreement consisted of two separate contracts: first, a contract of the three banks to merge under the name of Farmers National Bank; and, second, the contract of the Penn National Bank and the Reading National Bank forthwith to transfer and assign all their assets to Farmers National Bank conditioned upon the assumption by Farmers National Bank of all their liabilities (Par. 6, R. 4; Par. 6, R. 36-37; Exhibit A, R. 11-13; Exhibit A, R. 44-46).

The bills allege that the contract for the transfer of the assets and the assumption of the liabilities was fully carried out with the knowledge, approval, and acquiescence of the Comptroller of the Currency. All the assets of the two banks were transferred and delivered to the Farmers National Bank (Par. 9, R. 5; Par. 9, R. 37).

Thereafter both the Penn National Bank and the Reading National Bank ceased to exercise any control over their former assets (Par. 9, R. 5; Par. 9, R. 37), and the Farmers National Bank assumed control of all the commingled assets and used the same indiscriminately in the conduct of its business regardless of their source or origin (Par. 14, R. 6; Par. 14, R. 39). The only assets which the Penn National Bank and the Reading National Bank had thereafter consisted of their claims against the Farmers National Bank under the contract of assumption of their liabilities (Par. 25, R. 9-10; Par. 25, R. 42).

The petitioners contend that the comptroller was not bound "by the attempted merger of the three banks". They argue that no "legal consolidation" resulted from the contract and that the mingling of the assets did not create a "legal consolidation" (See Petitioners' Brief, pages 21, et seq.).

These contentions, even if sound, are irrelevant. The respondents' right to relief is based not on the proposition that there was a legal consolidation of the three banks, but upon the rights which accrued to the Penn National Bank and the Reading National Bank against the Farmers National Bank under the contract which provided for the transfer of their assets and the assumption of their liabilities.

There were two distinct contracts between these banks. Both are contained in the agreement executed February 17, 1933. The first contract contemplated a merger or consolidation under statutory provisions (12 U. S. C. Sec. 33). This contract was never completed. The second contract provided for a present transfer of the assets of Penn National Bank and Reading National Bank, both on the verge of insolvency, by resolution of their boards of directors,

conditioned upon the assumption of their liabilities by Farmers National Bank. This contract was within the powers of a national bank under the statutory provisions which confer on a national bank the power to exercise by its board of directors "all such incidental powers as shall be necessary to carry on the business of banking" (12 U. S. C. Sec. 24, seventh). This contract was fully carried out. The assets were transferred and the liabilities assumed.

The petitioners fail to recognize that the agreement contains two contracts. The first contract to merge or consolidate may have been dependent upon the performance of the second contract to transfer the assets, but the second contract was in no wise dependent upon the completion of the first contract to consolidate. The lower court therefore was not in error in ignoring the first contract. It had no bearing whatsoever upon the rights of the parties which had already accrued under the second contract, in conformity with which the assets had been transferred and the liabilities assumed.

It is submitted that the contract to transfer the assets was valid, that the sale of the assets was a valid transfer, and that the assumption of the liabilities created a lawful and enforceable obligation.

It has been repeatedly held that a transfer of assets, in consideration of the assumption of liabilities, by a national bank on the verge of insolvency, to another national bank, by virtue of resolutions of the boards of directors, is legal and not ultra vires of either bank. CITY NATIONAL BANK OF HURON v. FULLER, 52 Fed. (2) 870 (C. C. A. 8); B. V. EMERY & Co. v. WILKINSON, 72 Fed. (2) 10 (C. C. A. 10); HAYS v. WILKINSON, 72 Fed. (2) 201 (C. C. A. 10); RICHTER v. LAREDO NATIONAL BANK, 62 Fed. (2) 289 (C. C.

A. 5); ABERLY v. CRAVEN COUNTY, 70 Fed. (2) 52 (C. C. A. 4); WANNAMAKER v. EDISTO NATIONAL BANK, 62 Fed. (2) 696 (C. C. A. 4).

The contract to transfer the assets was consistent with the policy and provisions, express or implied, of the National Bank Act, and was therefore subject to state laws. JENNINGS v. U. S. F. & G. Co., 294 U. S. 216, 219. Under the law of Pennsylvania where one transfers all his property to another who agrees to pay all the debts of the transferror, not only the transferror but all creditors of the transferror have a direct claim against the transferee as beneficiaries of the contract. MITCHELL, RECEIVER OF LIBERTY CLAY PRODUCTS Co., 291 Pa. 282, and cases cited.

The contract of transfer of assets and assumption of liabilities did not require the approval of the Comptroller of the Currency to give it legal effect. As a matter of fact, however, it is alleged in the bills (Pars. 9; R. 5, 37-38) and not denied, that the transfer of assets and assumption of liabilities was "with the knowledge, approval, and acquiescence of the Comptroller of the Currency". It is also alleged in the bills and admitted by the motions, that the supplemental agreement of February 20, 1933 (Exhibits B, R. 13-14; 46-47) was entered into "at the direction of the Comptroller of the Currency" (Pars. 7; R. 4-5, 37). It is also alleged and admitted that thereafter the comptroller administered the transferred assets (Pars. 16; R. 7, 39-40).

(b) THE CLAIMS ARE SUFFICIENT TO PAY ALL THE DEBTS OF THE TWO BANKS WITHOUT THE NECESSITY OF AN ASSESSMENT ON STOCKHOLDERS.

The one bill alleges that the assets transferred by the Penn National Bank, consisting of cash on hand and due from banks, securities, loans and discounts, mortgage

loans, real estate and other property had a value in excess of $6,500,000, which after a depreciation of over $1,000,000, represented a fair and reasonable net market value of over $5,400,000 (Par. 10, R. 5), as against liabilities of approximately $5,100,000 (Par. 11, R. 5-6), an excess of assets over liabilities of more than $350,000 (Par. 12, R. 6).

The other bill alleges that the assets transferred by the Reading National Bank, similar in nature, had a fair and reasonable value in excess of its liabilities (Pars. 10, 11, 12, R. 38).

The amendments to the bills allege that the assets of the Farmers National Bank were similar in character and had a book value of approximately $9,500,000, and, after deducting a depreciation of approximately $1,500,000, had a fair and reasonable net market value of approximately $8,000,000, as against liabilities to creditors of approximately $9,000,000. In the event of ultimate deficiency there was in addition, the stockholders' liability of $1,000,000 (Amendment, Par. 1, R. 22-23; Amendment, Par. 1, R. 53-54).

The general claims of the Penn National Bank and the Reading National Bank included not only the obligation of the Farmers National Bank to the two banks and to their creditors, and also the stockholders' liability of $1,000,000, but, in addition, the assets of the Penn National Bank and the Reading National Bank transferred to the Farmers National Bank, and the commingled assets of the Farmers National Bank, were subject to an equitable lien or charge in favor of the Penn National Bank and the Reading National Bank and their creditors, and constituted a trust fund for their benefit (Amendment, Par. 1, R. 22-23; Amendment, Par. 1, R. 53-54).

The amendments to the bills definitely allege that the general claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank as thus constituted, were then and now are more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities of the two banks without the necessity of an assessment on the stockholders (Amendment, Par. 1, R. 22-23; Amendment, Par. 1, R. 53-54).

The majority opinion of the Circuit Court of Appeals gave due consideration to these allegations in the bills as amended. In his dissenting opinion, Judge Buffington in connection with his reliance upon the recitals in the order of assessment, quoted from the first opinion of the District Court in dismissing the bills, to the effect that they failed to show that the stockholders had suffered by the method adopted by the comptroller, and failed to show that the agreement of the Farmers National Bank to pay the liabilities of the two banks was worth more than the assets which were allocated in its place (R. 73). But these objections had been met by the amendments to the bills, and in its second opinion the District Court expressly had stated that its remarks in the first opinion on that point should be disregarded (R. 24). It was these remarks in the first opinion of the District Court which Judge Buffington quoted by inadvertence.

(c) The Comptroller Refused to Enforce the Claims.

As has already been pointed out, the bills specifically allege that the only resources which the Penn National Bank and the Reading National Bank had were the claim of each against the Farmers National Bank.

The bills also allege that the comptroller, the conservators, and the receivers failed, neglected and refused to

collect these claims and without warrant or authority of law, cancelled, abrogated and waived them in fraud of the rights of the two banks, their depositors and other creditors, and the stockholders thereof, and by reason thereof failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed (Par. 25, R. 9-1; Par. 25, R. 42).

(d) The Comptroller Without Authority Abrogated the Claims.

The bills allege that on February 17, 1933, the Penn National Bank and Reading National Bank transferred and delivered to the Farmers National Bank all their assets, surrendered complete control and possession thereof as well as their business, and in accordance with the provisions of said agreement, the Farmers National Bank appointed executive officers to conduct its business at the former places of business of said Penn National Bank and Reading National Bank under the designation of branches of the Farmers National Bank, and thereafter, with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives, ceased to exercise any control or dominion over their former assets and ceased to transact any business whatsoever. (Par. 9, R. 5, 37-38.)

The bills allege that immediately upon execution of said agreement of February 17, 1933, the Farmers National Bank with its combined resources and liabilities, comprising its own original resources and liabilities and those derived from the Penn National Bank and the Reading National Bank, carried on and conducted its regular banking business, commingled all its assets, regardless of their source of origin, and used the same indiscriminately in the

conduct of its business and in the discharge of its obligations whether original or assumed. (Par. 14, R. 6, 39.)

The bills further allege that on March 18, 1933, the Acting Comptroller of the Currency certified that the Farmers National Bank was unable to transact and carry on its ordinary banking business or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of depositors and other creditors and thereupon appointed Wellington M. Bertolet, Conservator of the Farmers National Bank under the provisions of the Conservation Act of March 9, 1933, who as such conservator under the direction of the Comptroller of the Currency, took possession of the books, records and assets of every description of the Farmers National Bank, which included not only the original books, records and assets of the bank, but those acquired by the bank under the terms of the agreement of February 17, 1933 from the Penn National Bank and Reading National Bank, and thereafter, the conservator of the Farmers National Bank, pursuant to his duty as such administered all the assets of the Farmers National Bank including the assets which had been derived by the Farmers National Bank from the Penn National Bank and Reading National Bank. (Pars. 15-16, R. 6-7, 39-40.)

The bills further allege that on or about October 10, 1933, eight months after the transfer of the assets had taken place, the comptroller without notice of any kind to the two banks or to their creditors or stockholders, without a hearing, and without warrant or authority of law or a decree or order of a court of competent jurisdiction, made a ruling to the effect that the agreement of February 17, 1933 was with-

out legal effect and directed that the transfer and delivery of the assets and the assumption of liabilities thereunder should be disregarded (Par. 17, R. 7; Par. 17, R. 40).

Thereupon in pursuance of his ruling, the comptroller appointed as conservator of the Penn National Bank and of the Reading National Bank, Wellington M. Bertolet who had previously been appointed conservator of the Farmers National Bank (Par. 18, R. 7-8; Par. 18, R. 40).

Under date of October 20, 1933, the comptroller proposed a so-called plan of reorganization of the three banks based upon his ruling, which provided for the organization of a new national bank, the issuance of stock and securities, a pledge of assets to secure a loan from the Reconstruction Finance Corporation and a sale of assets to the new national bank in consideration of which the new national bank was to establish on its books lump sum credits for the benefit of the conservator of each of the three banks in an amount sufficient to permit a distribution to be made to the depositors and other creditors of each of the banks in the following percentages of the claims against them: 35 per cent. to the Farmers National Bank; 25 per cent. to the Penn National Bank; and 25 per cent. to the Reading National Bank (Par. 19, R. 8, Amendment, Par. 2, R. 23; Par. 19, R. 40-41; Amendment, Par. 2, R. 54).

Wellington M. Bertolet, as conservator of each of the three banks, each of which had interests adverse to the other, pursuant to the instructions of the comptroller, abrogated the agreement of transfer of February 17, 1933, and ignored and disregarded the claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank in putting into effect the so-called plan of reorganization (Pars. 20, 21, R. 8-9; Pars. 20, 21, R. 41).

The bills allege that the ruling of the comptroller and his action thereunder in abrogating the agreement, was beyond the powers conferred upon him under the National Bank Act or other statutory law, was an unlawful assumption of judicial power neither delegated to him by statute nor capable of being delegated, and was in violation of the rights of the Penn National Bank and the Reading National Bank, and the depositors and other creditors and stockholders thereof, and deprived them of their property without due process of law (Par. 22, R. 9; Par. 22, R. 41).

It is respectfully submitted that the comptroller can point to no authority whatever to justify his conduct. His authority, of course, is entirely statutory. The only statutes applicable to this situation are the National Bank Act and the Conservation Act of March, 1933 (12 U. S. C. Sec. 203).

In the first place, it is doubtful whether under the latter act he had the authority to appoint a conservator for either the Penn National Bank or the Reading National Bank, which he did in October, 1933. Both banks had ceased business and had sold all their assets eight months before. The Conservation Act authorizes the comptroller to appoint a conservator for the conservation of the assets pending further disposition of the business as provided by law. The further disposition is either the resumption of business by the bank (Sec. 204) or reorganization (Sec. 207). In the instant case resumption of the business of the two banks was out of the question. They had agreed to go out of business and had gone out of business. For the same reason it is highly doubtful whether any reorganization of the two banks could have been possible within the meaning of the act.

But aside from this point, neither the National Bank Act nor the Conservation Act confers any authority upon the comptroller, nor upon any conservator or receiver appointed by the comptroller, to abrogate or cancel valid contracts which have been fully executed and under which the rights of the parties have been fixed. When the comptroller attempted to do so he was attempting to exercise judicial power, which not only is not conferred upon him by law, but which, if it were, would require a judicial determination after notice and hearing.

Moreover it cannot be contended by the petitioners that the National Bank Act in Sec. 192 gave the receivers authority to dispose of the claims of the two banks against the Farmers National Bank in the manner in which it was attempted. The statute requires a receiver to collect all debts, dues and claims belonging to the bank. In the case of bad or doubtful debts the receiver is authorized to sell or compound them but only upon an order of a court of record of competent jurisdiction. No such order was ever sought or obtained in this case (Par. 17, R. 7; Par. 17, R. 40).

It is clear, therefore, that the comptroller acted without authority, and in an arbitrary manner. His conduct was capricious. It violated the rights of the creditors and stockholders of the Penn National Bank and Reading National Bank and deprived them of their property without due process of law.

As stated in the majority opinion of the Circuit Court of Appeals (R. 68), ". . . it was beyond the power of the Comptroller, eight months afterward by mere ipse dixit, to set aside the contracts between the banks and proceed as though they had never been made. . . . Congress did not give him such power. No principle of law, which, in

our opinion, authorizes the Comptroller to do this has been cited by counsel or the court below." Again the court said (R. 70), "He abrogated and set aside valid contracts between the banks and did not take into account, when he made the levy, the contract obligation of the Farmers Bank to pay 'all the deposit liabilities, except liability to stockholders as such', but with administrative fiat, without notice to the banks, without a hearing and without due process of law, he stripped the banks of their only assets, which it is alleged and not denied, were sufficient to pay all the debts of the banks without the necessity of making an assessment, and thereupon substituted the portion of the assets of the Farmers Bank, to which he thought under changed conditions and materially different circumstances the other two banks would be entitled at that time. He thus without authority and contrary to law tried to create a new situation upon which he determined the necessity of enforcing individual liability of stockholders."

The bills of complaint and the amendments thereto specifically allege the facts to show such arbitrary and unlawful conduct.

V.

The Contention That Respondents Are Guilty of Laches Was Not Considered by the Circuit Court of Appeals, Was Not Mentioned in the Petition for Writ of Certiorari or in the Specifications of Error, and Is Without Merit.

The petitioners contend that the respondents are guilty of laches (See Petitioners' Brief, pages 35 et seq.). The question of laches was not considered by the Circuit Court of Appeals and was not mentioned in the petition for writ

of certiorari or in the specifications of error. Under these circumstances the question is not properly before the Court for review. ZELLERBACH PAPER CO. v. HELVERING, 293 U. S. 172; HELVERING v. TAYLOR, 293 U. S. 507, 511.

The petitioners make the statement that the respondents complain of the fact that the comptroller proposed a plan of reorganization which involved a sale of *their* assets to a newly organized bank. That statement is incorrect. The assets which were involved in the sale were the assets of the Farmers National Bank, which acquired title to them on February 17, 1933, from the Penn National Bank and the Reading National Bank. The petitioners further state that the respondents complain about the division of the proceeds of the sale among the three banks and of the fact that the conservator, acting under instructions from the comptroller, reallocated the assets among the three banks without attributing proper value to the claim of the Penn National Bank and Reading National Bank against the Farmers National Bank. While these allegations are made in the bills of complaint, they are made not as the basis for the right to equitable relief, but as showing the arbitrary and capricious conduct of the comptroller in attempting to abrogate the valid claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank which were their only resources for the payment of their liabilities and which were sufficient to pay all their debts.

The complaint of the respondents, as specifically set forth in the bills, arose on January 15, 1935, when the comptroller made the order of assessment. Within five weeks thereafter the respondents filed their suits to have the order set aside as invalid and illegal. Until the assessment was made, the respondents could rightfully presume that the

actions of the comptroller, the conservators, and the receivers were regular and lawful.

The petitioners further contend that the stockholders must be taken to have known of the proposed plan of reorganization, the sale of assets to the new bank, and the reallocation of the assets among the three banks. But the bills expressly allege that the comptroller acted *without notice* to the Penn National Bank or the Reading National Bank, to their depositors and other creditors, or to their stockholders (Par. 17, R. 7; Par. 17, R. 40).

It is thus clear that the bills do not disclose laches.

CONCLUSION.

The respondents submit that the statutory liability of stockholders of a national bank is a conditional one. The power of the comptroller to make an assessment is not an unlimited power. Before he may exercise his judgment as to the necessity and amount of an assessment, the ordinary resources of the bank must have been exhausted. This is the basic or quasi-jurisdictional fact upon which his power is conditioned. Unless this fact exists there is no power in the comptroller to make an assessment. In the present case the allegations of the bills, which are deemed admitted, set forth that this fact did not exist.

It is further submitted that a court of equity may restrain any administrative official, including the comptroller, where he acts beyond his authority, violates the requirements of due process, or where his actions are arbitrary and capricious. In the present case the allegations of the bills set forth in detail such arbitrary and capricious conduct on the part of the comptroller and the receivers in violation of the requirements of due process.

It is submitted that the bills of complaint set forth a cause of action which entitle the respondents to the relief prayed for.

This Court should affirm the decree of the Circuit Court of Appeals.

Respectfully submitted,

EDWARD W. MADEIRA,
GEORGE EVES,
JOHN B. STEVENS,
HARRY W. LEE,
EDWARD D. TREXLER,
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LEMUEL B. SCHOFIELD,
Attorneys for Respondents.

APPENDIX.

THE CONGRESSIONAL GLOBE, May 10, 1864, 38 Cong. 1st Session, pp. 2203-2204.

MR. COWAN: I move to amend the bill in the fiftieth section in the eighth line after the word "collect," by inserting:

> An amount from each shareholder equal to the amount of stock held by such stockholder in such association, and

So that the clause will read:

> That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect an amount from each shareholder equal to the amount of stock held by such stockholder in such association, and all debts, dues and claims belonging to such association, &c.

I will merely remark that this is to add a still further security to the remedial provisions of the bill. It is provided in the twelfth section that

> The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of

this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

From that it will appear that each shareholder is liable not only for the amount of stock which he has invested in the association, but in case of its failure or insolvency he is liable for an amount equal to that stock, over and above the original investment; but there is no adequate provision in my opinion by which the liability could be available as assets in case the association became insolvent; and in order to remedy that, I propose to insert that the receiver who shall be appointed by the Comptroller when the bank fails, among other things shall be authorized to collect from each shareholder an amount equal to the stock held by him in the association, and that that amount when so collected shall go into and become part of the assets of the association for the payment of its creditors. I think there can be no objection to that. It furnishes a remedy which perhaps the creditor would not otherwise have.

MR. SHERMAN: The language of the amendment of the Senator from Pennsylvania does not conform to the exceptions made in the bill as to individual liability; but I submit to him an amendment which I think will accomplish his object, and I desire to see it accomplished. If what I have drawn up is satisfactory to him, I hope he will accept it as a substitute for his amendment. There are exceptions and qualifications of the individual liability in section twelve, which would not be covered by his amendment. I move this amendment to come in at line thirteen, section fifty, after the word "direct":

And may, if necessary to pay the debts of such association, enforce the individual liability of the stockholder provided for by the twelfth section of this act.

MR. COWAN: I am fearful that will not accomplish what I design, because it leaves the difficulty precisely where we find it, and that is as to how shall this individual liability be enforced.

MR. SHERMAN: By suit.

MR. COWAN: If by suit, what shall be recovered? It will be observed that the shareholder is bound to pay to the amount of the stock he has subscribed, in addition to that stock, but equally and ratably, and not one for another. He is not surety for his fellows; he is only to pay his share of the loss. Unless the receiver shall have authority to collect this, it will be almost utterly impossible for the creditors of the association to achieve anything out of that remedy, and I desire by my amendment to give the receiver authority to collect upon the individual responsibility obligation of the shareholder at the same time that he commences to collect the other part of the assets of the bank, and in that way he will have them all together. If the institution turns out to be solvent, of course the shareholder will get his money back. If it turns out that only a portion of the money will be required to meet the liability, he will get the residue back. But if there is anybody to have the advantage of it, the creditor will have the advantage, and the creditor ought to have the advantage, because the default is on the part of the stockholder and the institution of which he is a shareholder. But to say that the receiver shall go on and collect all other debts and dues belonging to the association, and then distribute them, and afterwards proceed against the stockholders upon the individual lia-

bility clause, is, to my mind, to fritter away the remedy so as to make it worthless.

I hope the Senate will adopt the amendment I have proposed, which is fair, and which is but just to the creditor. These creditors should have a remedy, and they should have it directly and without any delay whatever. This debt which is due from the stockholder on his individual responsibility obligation is just as much a part of the assets of the association as that stock which is paid in, and it ought to be as promptly forthcoming to meet claims against the association as that which is paid in; and I therefore hope that the receiver will have authority, the moment he is appointed, to go on and collect it. If it is needed, it will be there ready for the creditor; if it is not needed, the shareholder will get it back again when the association is wound up.

Mr. Sherman: The statement of the Senator from Pennsylvania shows that he either misconceives the provision of the bill or wishes to make this proceeding unreasonably harsh. This individual liability is a contingent liability to make good all deficiencies, if any occur, in the payment of the debts of the association. Under his amendment it will be the duty of the receiver first of all to collect from the stockholders an amount equivalent to their stock, instead of proceeding to collect the assets of the association and the debts due to it. It may happen that when those debts and assets are collected there will be ample to pay all demands. That may be apparent on the face of the statement of the bank at the time of its failure. There would then be no necessity for making a collection from the stockholders. But the Senator says that if the money is collected it can be refunded to the stockholders when it

is found not to be needed. That is a roundabout and unreasonable way of enforcing an individual liability.

The amendment I offer will give the receiver, whenever he ascertains that it is necessary to enforce this individual liability, the right to enforce it by suit. It seems to me, therefore, that the amendment I propose will carry out the purpose of the bill, to enable the receiver at any time, whenever it becomes necessary, to enforce the individual liability; and in case it is not necessary, if the other assets are sufficient, he will not enforce this contingent liability, which is intended as an ultimate security of the creditors of the bank.

Mr. Johnson: The provision in question is to be found in a great many charters; but never heretofore, in any instance that I am aware of, has it been held that the personal liability of the stockholder is to be enforced until it is ascertained that the assets of the bank or association are not sufficient to meet the demands upon it. In other words, the responsibility of the stockholder for the amount of his stock, or, as is sometimes the case, the absolute responsibility of the stockholder for the amount of the debt, is a responsibility contingent upon the failure of the assets of the bank or the association to meet the demands upon it, and is never enforced until that fact is ascertained, and it is done by a bill in chancery. The proposition of the honorable Senator from Pennsylvania would subject these stockholders to a suit at once, and each man may be compelled and will be compelled to pay, according to his amendment, an amount equal to the amount of the par value of his stock, and that will be enforced by suit, and it may turn out in the end that there was no necessity to bring suit. The only security to the billholder or the creditors of the

bank that the amendment offered by the member from Pennsylvania will give is the chance that the stockholders are more able to pay at once than they will be able to pay after the actual sufficiency or insufficiency of the assets of the bank shall have been ascertained. It appears to me, however, rather an unnecessary hardship on the stockholders, and without really giving any additional substantial security to the creditors.

MR. COWAN: With all deference I differ as to the character of the liability. It is said to be a contingent liability, and only to be resorted to in the event that the other assets of the bank are not sufficient to meet the claims upon it. I think on the other hand that it is a direct liability, and that the amount involved in it is as much liable to the payment of the claims of the just creditors of the bank as any other portion of the assets of that bank. But if we suppose for one moment that all other debts and dues and assets of the bank are collected and distributed to and among the creditors, then I should like to know what this individual liability clause is worth in the shape in which it stands here? The stockholder is not a surety for his costockholder; he is only bound equably and ratably for his proportion. How could it be enforced by even a bill in chancery? How many judgments would there be against him? What would be the amount of these several judgments? Here are ten thousand note-holders, if you please. He is equably and ratably bound to pay to each one of them his share of the indebtedness of the association to them. If there are a thousand stockholders, and the holder of a five dollar note is a claimant, he would only be bound, supposing each stockholder to have one share, to pay that fellow half a cent. Then that one is to have judgment for half a cent against him, and another one for another half cent, and so on.

Mr. President, I do not know what the experience of the honorable Senator from Maryland may be in enforcing an individual liability clause of this kind; but if he has ever known any one of them enforced, and if he has ever known any fruit to be derived from a remedy of this kind, he has known more than I have. Put in here, they are a snare and a delusion; but with such an amendment as I offer they will become valid and binding on the shareholders, and the moment the bank fails every shareholder knows that in addition to the stock he has already paid in he is bound to pay up a similar amount. It is not necessary that he shall be sued. He need not sustain an action if he chooses. All he has to do is to continue his position as shareholder or stakeholder, if you please, because the money he puts in is merely in pledge that the assets shall redeem the liabilities of the bank. If the money is not wanted he will get it back again. If a portion of it is wanted he will get the residue back; and there is nothing unjust in it.

But if there is to be no individual liability, no responsibility on the part of the shareholder, or if that responsibility is not to be enforced by the proper remedy, let the bill remain as it is, or leave it to the remedy proposed by the Senator from Ohio, which, in my opinion, is no remedy at all, just leaving it where it was. Require the shareholder honestly and fairly, for the benefit of those who have trusted this association, who have dealt with it upon the faith of this clause, to put up his money, and after the debts are paid, if there is any over he will get it back, and if the debts are not paid he will not get it back. That is the fair meaning of it. I hope the amendment may be agreed to.

THE PRESIDENT *pro tempore:* The question is on the amendment submitted by the Senator from Ohio to the amendment of the Senator from Pennsylvania.

MR. COWAN called for the yeas and nays; and they were ordered.

MR. ANTHONY: Let the amendment to the amendment be reported.

The Secretary read the amendment of Mr. Cowan and the amendment of Mr. Sherman.

MR. COWAN: I submit that the proposition of the Senator from Ohio is not an amendment to my amendment.

MR. SHERMAN: If my amendment be adopted, of course it will dispense with the amendment of the Senator from Pennsylvania, and therefore it is a substitute for it.

THE PRESIDENT *pro tempore:* The Chair understands that the amendments are to different parts of the section; each would, therefore, more properly be a separate amendment of itself, but one can be treated as a substitute for the other by general understanding.

MR. COWAN: Then I ask that the vote may be taken on my amendment first, if that be in order.

MR. SHERMAN: I have no objection to that course. I will only repeat that the amendment of the Senator from Pennsylvania would substantially require this contingent liability to be enforced first; that is, before the debts due to the bank were collected the receiver must collect the amount from the stockholders for which they might be liable in a contingency, leaving the debts to be collected afterwards.

MR. COWAN: That is a *non sequitur;* it does not necessarily follow. The receiver is to have authority to collect not only all the debts due to the bank but also to collect that which would be due from the stockholders on their individual liability clause. He may do it first if he chooses, or he may do it last. Something must be left to his discre-

tion and that of the Comptroller in endeavoring to enforce the remedy. He will not be likely to do it if it is unnecessary.

MR. ANTHONY: Do I understand that the whole contingent liability of the stockholders is to be collected in the first instance, whether it be found necessary to resort to that or not, and then if it shall not be found necessary to resort to that, or it shall only be found necessary to resort to part of that, to return the balance? Are we to go through the expense of collecting and returning it without ascertaining whether it is necessary?

MR. SHERMAN: That is the precise difference between the two. My amendment provides for enforcing the contingent liability as soon as it is ascertained that it is necessary.

MR. COWAN: It is not exactly as stated by the honorable Senator from Rhode Island. The receiver will have the authority to do what he alleges is contemplated in the amendment, but it will not be obligatory on him to do it. He may resort to the collection of this fund immediately on accepting the appointment of receiver, or he may wait and bide his time until he ascertains whether it will be necessary to resort to that or not. He is to have the authority by the amendment that I offer.

THE PRESIDENT *pro tempore:* The question will be on substituting the amendment of the Senator from Ohio for that proposed by the Senator from Pennsylvania. That will be the question before the Senate.

The question being taken by yeas and nays, resulted—yeas 26, nays 10; .....

So the amendment to the amendment was adopted.

SUPREME COURT OF THE UNITED STATES.

Nos. 123 and 124.—October Term, 1937.

Harvey S. Adams, as Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania, Petitioner,
123 *vs.*
Geneva M. Nagle, et al.

Harvey S. Adams, as Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania, Petitioner,
124 *vs.*
J. Edwin Tobias, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

These are stockholders' suits to enjoin the receiver of two national banks from enforcing assessments ordered by the Comptroller of the Currency pursuant to the statute governing the additional liability of shareholders.[1]

The respondents in No. 123 are stockholders of the Penn National Bank and Trust Company of Reading, Pennsylvania; those in No. 124 are stockholders of the Reading National Bank and Trust Company of the same city; and the petitioner is receiver of both banks. The controversy has its origin in a transaction between the two banks and the Farmers National Bank and Trust Company of Reading. The causes of action are identical and it will suffice to outline the allegations of the bill in No. 123. These are:

On February 17, 1933, Penn and Reading were subjected to unusual withdrawals which depleted their reserves and placed both on the verge of insolvency. Due to this condition the two banks

[1] R. S. § 5151; Act of Dec. 23, 1913, c. 6, § 23, 38 Stat. 273, U. S. C. Tit. 12, §§ 63 and 64.

on that date entered into an agreement with the Farmers contemplating a consolidation of the three in accordance with Title 12 U. S. C. §§ 33 and 34. The agreement called for a valuation of the assets of the three banks with ensuing recapitalization and for the Comptroller's approval of the terms of consolidation as required by law. It further provided for transfer by Penn and Reading of all their assets to Farmers, with the right to hypothecate and rehypothecate them, and for assumption by Farmers of the liabilities of the transferring banks except that to stockholders, they reserving the right to enforce against their stockholders any statutory excess liability. Farmers was to operate their banking houses as its branches. On the same day Penn and Reading turned over their assets to Farmers which mingled them with its own and thereafter dealt with them as its own. There is no assertion that on February 17 the Comptroller knew, or approved, of the agreement and transfer. It is alleged, however, that, by his direction, a supplemental agreement was made February 20, 1933, by which Penn and Reading guaranteed to Farmers that the assets of each would exceed in value its liabilities assumed by Farmers under the agreement of February 17; and that he acquiesced in the continued administration of the affairs of Penn and Reading by Farmers. On February 17 the assets of Penn which were transferred to Farmers had a reasonable market net value of $5,400,000 as against total liabilities of $5,100,000, and the assets of Farmers were of the fair value of $8,000,000 (to which is to be added the stockholders' liability for assessment in the amount of $1,000,000), as against liability to creditors of $9,000,000.[2] The claims of the two banks against Farmers were, at the date of transfer, and still are, more than sufficient, in the ordinary course of liquidation, to pay all of their liabilities without the necessity of an assessment of the stockholders.

Farmers continued to do business with the combined and commingled assets from February 17 to March 18, 1933. Then the Comptroller appointed a conservator who took possession of all of the assets. October 10, 1933, the Comptroller, without notice to Penn or Reading, their depositors, creditors, or stockholders, and without a hearing, ruled that the agreements of February 17 and

[2] The bill in No. 124 alleges that on the same day Reading's assets exceeded in value its liabilities of approximately $9,000,000.

February 20 were without legal effect and directed that the transfer and delivery of the assets, and the assumption of liabilities thereunder, should be disregarded; and he attempted to allocate among the three banks the assets theretofore transferred and delivered to Farmers. He appointed the same person he had previously named conservator for Farmers to be conservator of the other two banks. October 20, 1933, the Comptroller proposed a so-called plan of reorganization of the three banks which provided for the organization of a new national bank, the issue by it of stock and securities, the pledge of some of its assets to secure a loan from Reconstruction Finance Corporation, a sale of the assets in the possession of the conservator of Farmers to the new national bank, and a division of the proceeds on the basis of thirty-five per cent. to Farmers, twenty-five per cent. to Penn, and twenty-five per cent. to Reading. It is charged that this division was arbitrary and was based on a classification adopted from the report of national bank examiners dated April 24, 1933, and not on the financial condition of the banks as of February 17, 1933, the date of the execution of the agreement, transfer of assets, and assumption of liabilities. The conservator of all three banks, in furtherance of the plan, reconstructed the assets and liabilities of each as of April 24, 1933, made a division thereof amongst the banks, consummated the sale to the new bank, and apportioned the proceeds according to the plan. In so doing, in conformity with the Comptroller's ruling, he disregarded all rights and obligations arising from the agreement of February 17, 1933, and disregarded the claim of Penn, in the amount of $5,100,000, and the claim of Reading, in the amount of $9,000,000, against Farmers. The bills charge that this conduct was arbitrary, and that the Comptroller's ruling respecting the two agreements was beyond the powers conferred upon him by the National Bank Act or other statutory law, was an unlawful assumption of judicial powers not delegated to him by statute, or capable of being so delegated, was in violation of the rights of Penn and Reading, their depositors, other creditors, and stockholders, and deprived them of their property without due process of law.

After consummation of the plan of reorganization the Comptroller certified that each of the three banks was insolvent and, in October and November 1934, appointed a receiver for each of them. January 15, 1935, he certified that, upon a proper accounting by

the receivers of Penn and Reading, and a valuation of the uncollected assets remaining in their hands, it appeared that a 100% assessment was necessary to pay their debts and he accordingly ordered such an assessment. The bills characterize his conduct as a failure, neglect, and refusal to collect the claims of Penn and Reading against Farmers and a consequent failure to comply with the conditions and provisions of the statute authorizing assessments of stockholders, and as "in fraud of the rights" of Penn and Reading, their creditors and stockholders. His ignoring the claims is charged to have been "a grave error of law based upon his unwarranted assumption of judicial power in abrogating, cancelling, and waiving" the claims of Penn and Reading against Farmers, and "adjudicating the private rights and obligations of parties not subject to his power and control", which invalidated the assessments.

The receiver interposed motions to dismiss which were sustained by the District Court. The Circuit Court of Appeals reversed,[1] holding the bills set forth a cause of action since, if their allegations were true, the Comptroller had exceeded his statutory power and acted arbitrarily in ordering the assessments. The importance of the question involved and asserted conflict of decision moved us to grant certiorari.

The petitioner's position is that the agreement and transfer of assets to the Farmers did not effect a statutory consolidation; that the Comptroller was, therefore, at liberty to treat all three banks as separate entities for the purpose of assessing stockholders' liability and that stockholders may not, by a proceeding in equity, challenge his official findings as to insolvency and necessity for an assessment. The respondents say the Comptroller's power of assessment is conditioned on a basic or quasi-jurisdictional fact,—that the ordinary resources of a bank have been exhausted,—and, if they have not been, or are deficient only because of the Comptroller's unlawful abrogation of and refusal to require collection of a valid claim sufficient to pay the bank's debts, the assessment is subject to direct attack as in excess of that officer's statutory power, as arbitrary, capricious, and a denial of due process of law. We are of opinion that the assessments were not subject to attack

[1] 88 F. (2d) 936.

or frustration in these proceedings upon the grounds set forth in the bills.

1. The agreements of February 17 and February 20 did not effect a consolidation in conformity with the National Banking Act so as to constitute the existing stockholders of Penn and Reading, together with the stockholders of Farmers, stockholders of a consolidated bank. The steps requisite to such consolidation were never taken.[4]

2. When the Comptroller took charge of the banks in question he was bound to deal with them, so far as their assets and liabilities were concerned and in respect of stockholders' liability, upon the basis that they were three separate associations. This conclusion is unaffected by the legality and effectiveness of the agreement of February 17, 1933, upon which respondents insist.[5] At most the agreement substituted a new asset—the promise of Farmers—for the old assets. Respondents do not claim that the contract and the transfer pursuant to it worked a novation whereby the creditors of the transferring banks became creditors of the transferee. So far as the Comptroller was concerned these creditors were still those of the former and entitled to look to their assets for payment.

3. Whether the Comptroller took the view that the contracts and what was done under them were effective to commute the physical assets of Penn and Reading into a chose in action against Farmers, or that the transaction did not so operate but left Penn and Reading owners of their assets so far as they could be identified and segregated, it was not, as respondents suggest, a condition precedent to the validity of his assessment that he should have exhausted the assets of Penn and Reading.

At the argument the position was taken that the Comptroller was without power to lay an assessment until he had gotten in the avails of all the ordinary assets of the banks and that the claims of Penn and Reading against Farmers under the contract of February 17 were such ordinary assets. The conclusion is that until the receiver of Penn and Reading had recovered upon the contract and

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[4] See U. S. C. Tit. 12, § 33.

[5] Compare City National Bank v. Fuller, 52 F. (2d) 870; Wannamaker v. Edisto National Bank, 62 F. (2d) 696, 699; Emery & Co. v. Wilkinson, 72 F. (2d) 10, 12.

distributed the proceeds the Comptroller was without power to order an assessment. No decision of any court was cited to support this position, but it was sought to maintain it by reference to an amendment of the National Bank Act of June 3, 1864,[6] offered and adopted in the Senate. The purpose of this amendment was stated to be to "enable the receiver at any time whenever it becomes necessary, to enforce the individual liability; and in case it is not necessary, if the other assets are sufficient, he will not enforce this contingent liability, which is intended as an ultimate security of the creditors of the bank." We think the adoption of the amendment in the light of the explanation is far from sustaining the respondents' contention. It has always been recognized that if the assets of a closed national bank are sufficient to answer its liabilities the Comptroller is not to levy an assessment, but to him is confided the determination of the sufficiency of the assets and, if he concludes they are insufficient, it is not only his right but his duty immediately to invoke the contingent liability of the stockholders. This has been the invariable administrative practice and any other would tend to depreciate the availability and the value of stockholders' liability.

4. The question remains whether, if the Comptroller's action arose from mistake of fact or law, the remedy here invoked is appropriate. In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has become insolvent, and to order an assessment up to one hundred per cent. of the par value of the stock against the shareholders to pay creditors' claims if, upon an investigation, he finds that the assets are insufficient to pay the debts. Plainly these are questions for the exercise of administrative discretion. The necessity for vesting this power in an administrative officer springs from the desirability of prompt liquidation. It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done.[7] It would be equally intolerable if stockholders as a class could call

[6] c. 106, 13 Stat. 99.

[7] Kennedy v. Gibson, 8 Wall. 498, 505; Casey v. Galli, 94 U. S. 673, 681; Bushnell v. Leland, 164 U. S. 684.

upon a court to review the Comptroller's exercise of his discretion. For a court to entertain a suit for this purpose would be to render nugatory the functions Congress has confided in the Comptroller. It has often been decided this may not be done.[8]

The respondents, however, urge, and the bill charges, that the Comptroller, in ruling that the contract of February 17 should be disregarded, and the receiver, in following this ruling, exceeded their statutory powers and acted arbitrarily and may be enjoined from enforcing an assessment based on the ruling. The contention rests upon a statement in *United States* v. *Knox*, 102 U. S. 425: "Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the shareholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction." This was said in a case where a creditor sought a mandamus to compel the Comptroller to order an assessment, he having refused so to do on the ground that the very terms of the statute forbade such action. Relying on this expression a number of the federal courts have said that, while an assessment may not be collaterally attacked, it may be voided by direct attack for "clear error of law, fraud or mistake."[9] Respondents admit this statement is too broad. Other courts have said that the only ground of successful attack is fraud on the part of the Comptroller.[10] This case presents no such basis for relief. The bills do not charge bad faith or fraud on the part of the Comptroller. The averment that his ruling with respect to the contract of February 17 and the consequent action of the receiver were "in fraud" of the rights of Penn and Reading and their

[8] Liberty National Bank v. McIntosh, 16 F. (2d) 906; Wannamaker v. Edisto National Bank, *supra*; Meeker v. Baxter, 83 F. (2d) 183; Davis Trust Co. v. Hardee, 85 F. (2d) 571; Acker v. Hamilton, 85 F. (2d) 574; Barbour v. Thomas, 86 F. (2d) 510; Church v. Hubbard, 91 F. (2d) 406.

[9] See, e. g., Dewecse v. Smith, 106 Fed. 438, 445; Emery & Co. v. Wilkinson, 72 F. (2d) 10, 12; Trustees v. Picher, 90 F. (2d) 741, 743; United States Nat. Bank v. Pole, 2 F. Supp. 153, 157; Angeny v. Kouper, 16 F. Supp. 542, 543.

[10] O'Conner v. Watson, 81 F. (2d) 833, 836; Meeker v. Baxter, 83 F. (2d) 183, 186; Davis Trust Co. v. Hardee, 85 F. (2d) 571, 573; Dunn v. O'Connor, 89 F. (2d) 820, 827.

stockholders falls far short of any charge of actual fraud. Indeed no suggestion of such fraud was advanced by respondents either in brief or in argument.

The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate of a statute. These have no application for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion. Plainly, therefore, the respondents are wrong in asserting that as the facts set forth in their bill charge the Comptroller with an error of law, he exceeded his authority.

The respondents further insist that their allegation that the Comptroller's action was "arbitrary", which is amplified and given content by the facts alleged and admitted by the motion to dismiss, requires a decree avoiding the assessment. The epithet "arbitrary", used in this connection, can mean no more than do the other averments that the Comptroller, in reaching his conclusion, "committed grave error of law" in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible.

A reference to the situation with which the Comptroller was confronted when his receiver took charge of the banks will serve to demonstrate that a case was presented calling for the exercise of his discretion. The bill asserts that over a substantial period subsequent to the transfer of Penn's and Reading's assets to

Farmers these were intermingled with Farmers' assets. It avers that an attempted segregation of assets was made upon the basis of a report of bank examiners dated April 24, 1933, more than two months after the transfer; it alleges that, at the date of transfer, Farmers owed $9,000,000 against which it had assets of $8,000,000 and a possible recovery by way of stockholders' liability of an additional million dollars; it fails to state what the condition of Farmers was when a conservator was appointed for it; what its condition was when a receiver was appointed for it; what its financial status is today. The pleader contents himself with the statement of a conclusion that the "claims" of Penn and Reading against Farmers were, at the time of transfer of their assets, and still are, sufficient in amount to pay all of those banks' creditors. But if the allegation is true, the only conclusion to be drawn from it is that in ordering the assessment the Comptroller erroneously estimated the value of the banks' assets. Whatever may be thought of the legality of the transfer of assets pursuant to directors' action on the eve of insolvency, the creditors of Penn and Reading were not bound to look to Farmers and might prefer to look to the assets transferred or to so much of them as could be traced. And there well may have been reason for the Comptroller to doubt the legal efficacy of the transfer in the face of creditors' attack. These and other matters were to be considered by him in arriving at an informed judgment as to the availability and value of the assets of Penn and Reading to answer the claims of their creditors. As an exercise of the discretionary power vested in him, the Comptroller's action must be treated as final and conclusive as to the necessity for an assessment.

5. If the Comptroller's decision with respect to the contract of February 17 was erroneous as matter of law the stockholders may or may not have a remedy. But their remedy is not to attack, or seek to evade payment of, the assessment. The collection of the assessment cannot be made to await the outcome of litigation of that question. Moreover, if, as they assert, the Comptroller's judgment is wrong and the assets of Penn and Reading, consisting of their claims under the contract, are sufficient to pay their creditors, the amounts paid pursuant to the assessments will be returned to stockholders in final liquidation. Meantime, however, the credi-

tors, the protection of whose interests is the primary object of the statute, will have been paid and, as is right, reimbursement of the stockholders will await possible realization upon assets which the Comptroller believes insufficient to satisfy the creditors.

The decrees are reversed and the causes remanded with instructions to dismiss the bills.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.